



March 28, 2003

ENGROSSED HOUSE BILL No. 1397

DIGEST OF HB 1397 (Updated March 26, 2003 6:40 PM - DI 87)

Citations Affected: IC 36-1.

Synopsis: Local public works projects. Gives a public works contractor discretion to have the board that contracts for the public work: (1) hold the retainage; or (2) place the retainage in an escrow account. Provides that the board is not required to pay interest on the retainage that the board holds.

Effective: July 1, 2003.

Summers, Buell

(SENATE SPONSORS — MERRITT, BREAUX)

January 14, 2003, read first time and referred to Committee on Local Government.
February 10, 2003, reported — Do Pass.
February 13, 2003, read second time, ordered engrossed. Engrossed.
February 17, 2003, read third time, passed. Yeas 94, nays 0.

SENATE ACTION

March 10, 2003, read first time and referred to Committee on Governmental Affairs and Interstate Cooperation.
March 27, 2003, reported favorably — Do Pass.

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March 28, 2003

First Regular Session 113th General Assembly (2003)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2002 Regular or Special Session of the General Assembly.

ENGROSSED HOUSE BILL No. 1397

A BILL FOR AN ACT to amend the Indiana Code concerning local government.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 36-1-12-14 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 14. (a) This section
3 applies to public work contracts in excess of one hundred thousand
4 dollars (\$100,000) for projects other than highways, roads, streets,
5 alleys, bridges, and appurtenant structures situated on streets, alleys,
6 and dedicated highway rights-of-way. This section also applies to a
7 lessor corporation qualifying under IC 21-5-11 or IC 21-5-12 or any
8 other lease-back arrangement containing an option to purchase,
9 notwithstanding the statutory provisions governing those leases.
10 (b) A board that enters into a contract for public work, and a
11 contractor who subcontracts parts of that contract, shall include in their
12 respective contracts provisions for the retainage of portions of
13 payments by the board to contractors, by contractors to subcontractors,
14 and for the payment of subcontractors. ~~Either the board or~~ **At the**
15 **discretion of the** contractor, ~~or both, shall place~~ the retainage **shall be**
16 **held by the board or shall be placed** in an escrow account with a
17 bank, savings and loan institution, or the state as the escrow agent. The

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escrow agent shall be selected by mutual agreement between board and contractor or contractor and subcontractor under a written agreement among the bank or savings and loan institution and:

- (1) the board and the contractor; or
- (2) the subcontractor and the contractor.

The board shall not be required to pay interest on the amounts of retainage that it holds under this section.

(c) To determine the amount of retainage to be withheld, the board shall:

- (1) withhold no more than ten percent (10%) of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) completed, and nothing further after that; or
- (2) withhold no more than five percent (5%) of the dollar value of all work satisfactorily completed until the public work is substantially completed.

If upon substantial completion of the public work minor items remain uncompleted, an amount computed under subsection (f) of this section shall be withheld until those items are completed.

(d) The escrow agreement must contain the following provisions:

- (1) The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent.
- (2) The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same proportion of then escrowed income to the person specified in the notice.
- (3) The escrow agent shall be compensated for the agent's services. The parties may agree on a reasonable fee comparable with fees being charged for the handling of escrow accounts of similar size and duration. The fee shall be paid from the escrowed income.

The escrow agreement may include other terms and conditions consistent with this subsection, including provisions authorizing the escrow agent to commingle the escrowed funds with funds held in other escrow accounts and limiting the liability of the escrow agent.

(e) The contractor shall furnish the board with a performance bond equal to the contract price. If acceptable to the board, the performance bond may provide for incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the contract

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price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

- (1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or
- (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety.

(f) The **board or escrow agent shall pay the** contractor ~~shall be paid in full, including all escrowed principal and escrowed income, by the board and escrow agent,~~ within sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter. **Payment by the escrow agent shall include all escrowed principal and escrowed income.** If within sixty-one (61) days after the date of substantial completion there remain uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. Required warranties begin not later than the date of substantial completion.

(g) Actions against a surety on a performance bond must be brought within one (1) year after the date of the board's final settlement with the contractor.

(h) This subsection applies to public work contracts of less than two hundred fifty thousand dollars (\$250,000). The board may waive the performance bond requirement of subsection (e) and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions instead of a performance bond. Subsections (e) through (g) apply to a letter of credit submitted under this subsection.

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Local Government, to which was referred House Bill 1397, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

MOSES, Chair

Committee Vote: yeas 14, nays 0.

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COMMITTEE REPORT

Mr. President: The Senate Committee on Governmental Affairs and Interstate Cooperation, to which was referred House Bill No. 1397, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is made to House Bill 1397 as printed February 11, 2003.)

RIEGSECKER, Chairperson

Committee Vote: Yeas 7, Nays 0.

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